84-754

No. 84-

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IN THE

Supreme Court of the United States

October Term, 1984

CITICORP,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

—and—

BANK OF BOSTON CORPORATION, THE STATE OF RHODE ISLAND and RIHT FINANCIAL CORPORATION,

Intervenor-Respondents.

CITICORP,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

—and—

FLEET FINANCIAL GROUP, INC.,

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

At issue in this case is the constitutionality of reciprocal Massachusetts, Connecticut and Rhode Island statutes that permit local bank holding companies to offer full banking services throughout a multi-state region but exclude companies from states outside that region from offering such services anywhere in the region. This is the same issue already before the Court in *Northeast Bancorp, Inc.* v. *Board of Governors*, 84-363 (petition for writ of certiorari filed Sept. 6, 1984) (*"Northeast"*),[1] and presents the identical questions:

1. Has Congress authorized confederations of states to create interstate banking regions through multi-state compacts that permit full service banking within the region by bank holding companies located there, but boycott the bank holding companies located in states outside the region?

2. Absent authorization by Congress, does such balkanization of interstate banking through regional compacts violate the Commerce Clause and the Compact Clause of the Constitution?

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1. This petition contains references to both the text and the Appendix of the Petition for Writ of Certiorari in *Northeast* ("the *Northeast* Petition").

Parties to the Proceeding

Pursuant to Sup. Ct. R. 19.4, this petition seeks review of two cases involving identical questions. The parties in the first case, *Citicorp* v. *Board of Governors,* No. 84-4121 (2d Cir. Oct. 10, 1984), are Citicorp, the Board of Governors of the Federal Reserve System, Bank of Boston Corporation, the State of Rhode Island and RIHT Financial Corporation. The parties in the second case, *Citicorp* v. *Board of Governors,* 84-4145 (2d Cir. Nov. 5, 1984), are Citicorp, the Board of Governors of the Federal Reserve System and Fleet Financial Group, Inc. Pursuant to Sup. Ct. R. 28.4(c), 28 U.S.C. § 2403(a) may be applicable with regard to the Commonwealth of Massachusetts and the State of Connecticut.

The statement required by Rule 28.1 is extensive and is set forth in the *Northeast* Appendix ("NA") at NA1 to NA20.

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IN THE

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October Term, 1984

CITICORP,

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—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

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BANK OF BOSTON CORPORATION, THE STATE OF RHODE ISLAND and RIHT FINANCIAL CORPORATION,

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—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

—and—

FLEET FINANCIAL GROUP, INC.,

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully requests that a writ of certiorari be issued to review the judgments of the United States

Court of Appeals for the Second Circuit, entered on October 10, 1984 and November 5, 1984, which affirmed orders of the Board of Governors of the Federal Reserve System (the "Federal Reserve Board" or the "Board"), dated August 20, 1984 and October 4, 1984, approving the acquisition by Bank of Boston Corporation ("BBC") of RIHT Financial Corporation ("RIHT"), and the acquisition by Fleet Financial Group, Inc. ("Fleet") of Fleet National Bank of Boston ("FNBB") and Fleet National Bank of Connecticut ("FNBC").

Opinions Below

The order that constitutes the decision of the Second Circuit in the action involving the BBC-RIHT transaction is not reported, and is reproduced in the Appendix to this petition at A1-A3.[2] The order that constitutes the decision of the Second Circuit in the action involving the Fleet-FNBB and Fleet-FNBC transactions also is not reported, and is reproduced at A4-A6. The opinion of the Court of Appeals in *Northeast* is reported at 740 F.2d 203 (NA21-NA33).[3]

The Board's order regarding the BBC-RIHT transaction (the "BBC-RIHT Order") is reported at 70 Fed. Res. Bull. 737 (1984) and is reproduced at A7-A18. The Board's order involving the Fleet transactions (the "Fleet Order") is not yet reported and is reproduced at A19-A22.

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2. Citations to the Appendix to this petition are cited as "A—."

3. Citations to the Appendix to the *Northeast* Petition are cited as "NA—."

The Board's order regarding Bank of New England Corporation's application to merge with CBT Corporation (the "BNE Order") containing a discussion by the Board of the same constitutional issues involved in this case, is reported at 70 Fed. Res. Bull. 374 (1984) and is reproduced at NA34-NA71.

Jurisdiction

The judgment of the Court of Appeals involving the BBC-RIHT transaction was entered on October 10, 1984 (A1-A3), and the judgment of the Court of Appeals concerning the Fleet transactions was entered on November 5, 1984 (A4-A6). This Court has jurisdiction to review the judgments of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves: the Commerce Clause (art. I, § 8, cl. 3) and the Compact Clause (art. I, § 10, cl. 3) of the United States Constitution; 12 U.S.C. § 1842(d) (the "Douglas Amendment"); a Massachusetts statute, Mass. Gen. Laws Ann. ch. 167A § 2 (West 1971 & Supp. 1984) (the "Massachusetts Act"); a Connecticut statute, 1983 Conn. Act 83-411 (the "Connecticut Act"); and a Rhode Island statute, R.I. Pub. Law S. 0061 Sub. A (the "Rhode Island Act"). These constitutional and statutory provisions are reproduced in the Appendix to the *Northeast* Petition at NA95 through NA106.

The Douglas Amendment and the Massachusetts, Connecticut, and Rhode Island Acts are described in detail on

pages 3-6 of the *Northeast* Petition. That petition also summarizes the pertinent legislative history, and the circumstances surrounding the adoption, of these laws and the formation of the New England Compact.

Statement of the Case

1. *The BNE Order and the Northeast Case.* The transactions challenged here are the fourth, fifth and sixth interstate transactions that have been proposed under reciprocal, regionally restrictive interstate banking statutes in New England. The legality of the first three such consolidations—the merger of Bank of New England Corporation ("BNE") and CBT Corporation ("CBT"), the acquisition of Arltru Bancorporation, Inc. ("Arltru") by Hartford National Corporation ("HNC"), and the acquisition of Colonial Bancorp, Inc. ("Colonial") by BBC —was challenged by Citicorp[4] before the Federal Reserve Board[5] and the Second Circuit,[6] and is now before this Court on the petition for a writ of certiorari in *Northeast* (No. 84-363).

The Board approved those applications under a novel standard requiring a showing of "clear and unequivocal" unconstitutionality (NA41). Nevertheless, the Board recognized that the regionally restrictive Massachusetts and

4. Northeast Bancorp, Inc. and Union Trust Company also challenged the BNE-CBT transaction before the Board and were parties to the challenge to all three transactions before the Second Circuit.

5. *See Northeast* Petition at 6-7.

6. *See Northeast* Petition at 7-8.

Connecticut Acts were enacted for purposes of economic protectionism (NA57-NA60).[7] It also found that this discrimination against interstate commerce was suspect because these statutes are not the product of unilateral conduct, but are part of an interstate compact that imposes these burdens on a multi-state basis (NA51-NA52).

Consequently, the Board declared that the Connecticut and Massachusetts Acts violate the Commerce and Compact Clauses unless they are saved by the Douglas Amendment (NA58; NA52). The Board also found that neither the terms of the Douglas Amendment nor its legislative history clearly demonstrates that Congress intended to allow states jointly to discriminate in the manner of the New England Compact.[8]

Given these findings, it is not surprising that the Board expressed serious doubts about its own decision.[9] Indeed, as Board Chairman Paul A. Volcker later advised Congress, the Board acted simply on an "assumption of constitutionality" when it approved the applications (NA197); and, according to Chairman Volcker, the Board perceives

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7. The Board's Order approving the HNC-Arltru transaction incorporated the discussion in the BNE Order by reference, and employed the same analysis with regard to the Massachusetts Act (NA75). Similarly, the Board's BBC-Colonial Order referred to the discussion in its BNE and HNC-Arltru Orders (NA83).

8. The Board stated that "the Douglas Amendment does not appear *on its face* to authorize discrimination" (NA65) (emphasis in original), and that the legislative history shows "no discussion of the power to discriminate among potential out-of-state entrants" (NA66).

9. The Board's orders specifically recognized that its tentative resolution of the "fundamental and unique constitutional issues" inherent in multi-state arrangements such as the New England Compact was "not free from doubt" (NA41; NA83).

"serious questions both about the constitutionality of such arrangements and their implications for public policy" (NA199).

The Second Circuit consolidated the petitions for review of these three orders in the *Northeast* case, and affirmed the Board's approval of those acquisitions. In doing so, the Second Circuit assumed that the challenged state statutes are unconstitutional under the Commerce Clause absent Congressional authorization. Although it cited no statutory language or legislative history that reflected such authorization, the Second Circuit concluded that the Massachusetts and Connecticut Acts were sanctioned by the Douglas Amendment (NA31). With regard to the Compact Clause, the Court of Appeals did not dispute the Board's finding that these reciprocal statutes are part of an interstate compact, but held that the compact does not require consent from Congress because it does not "increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States" (NA32). The Court failed to explain how the creation by a group of states of an exclusionary banking region could not have such effects, except to indicate its agreement with the Board's unsupported view that, by enacting the Douglas Amendment, Congress renounced all interest in the regulation of interstate banking (NA29).

On August 9, 1984, the Second Circuit stayed issuance of its mandate pending Supreme Court review (NA87).

On September 6, 1984, petitioners in *Northeast* filed a petition for a writ of certiorari, asking the Court to review and ultimately reverse the Second Circuit's judgment.

2. *The Present Controversy.* In March 1984, BBC, a Massachusetts bank holding company, applied to the Board for permission to acquire RIHT Financial Corporation, a bank holding company owning banks in Rhode Island. In May 1984, Fleet, a Rhode Island bank holding company, applied to the Board for permission to acquire FNBB, a Massachusetts bank, and FNBC, a Connecticut bank.

In its application to the Board for approval of its acquisition, BBC contended that the Massachusetts and Rhode Island Acts authorize the Board to approve the transaction under the Douglas Amendment. Similarly, Fleet asserted that the Massachusetts and Rhode Island Acts allow it to acquire FNBB, and that the Connecticut and Rhode Island Acts authorize its acquisition of FNBC. As an interested party that would be injured by consummation of the proposed transactions, petitioner challenged the BBC and Fleet applications on the grounds that the Massachusetts, Connecticut and Rhode Island Acts violate the Commerce and Compact Clauses, and that the Board therefore lacks authority to approve these interstate consolidations under the Douglas Amendment.

Based on its orders concerning the BNE-CBT, HNC-Arltru and BBC-Colonial transactions, the Board approved the BBC-RIHT and Fleet applications. In doing so, the Board explicitly stated that the constitutional issues involved here are the same as those at issue in *Northeast*, and

referred to its "detailed analysis" of those issues in the BNE Order (A14-A15; A21-A22).

Pursuant to 12 U.S.C. § 1848, Citicorp petitioned the Second Circuit for review of the Board's Orders. Subsequently, the parties to those appeals stipulated that the Board's orders would be affirmed in the Second Circuit without briefing and argument, based on that Court's decision in the *Northeast* case, but specifically agreed that the Second Circuit's judgments would be subject to a petition for a writ of certiorari to this Court. The Second Circuit embodied those stipulations in its orders as well as the parties' agreement to stay consummation of the transactions pending Supreme Court review (A1-A3; A4-A6).

Reasons for Granting the Petition

Petitioner respectfully submits that this petition should be granted for the same reasons stated in the petition for a writ of certiorari in *Northeast*.[10] In brief, these cases involve questions of critical importance to both banking institutions across the country and their federal regulators. Review by this Court is warranted because the deci-

10. The direct applicability in this case of the Rhode Island Act—which was not directly involved in the transactions in *Northeast*—does not distinguish the constitutional issues in this case from those in *Northeast*. The Rhode Island Act was enacted on May 17, 1983, in response to efforts of Massachusetts Senator John Brennan and others to set up "a real New England system" (NA189; NA162-NA168). It is modelled on the Massachusetts statute and has the same discriminatory, protectionist purpose (A30). Moreover, in its BNE Order the Board expressly discussed the Rhode Island Act in connection with the New England Compact, and in its BBC-RIHT and Fleet Orders the Board recognized that the instant acquisitions raise "the same" constitutional issues as those presented by *Northeast* (NA51; A15; A22).

sions below conflict with past decisions of this Court, and will open the door to state-created, regional balkanization of a vital sector of interstate commerce without approval by Congress of this concerted and discriminatory state activity. *See Northeast* Petition at 15-29.[11] Prompt review is essential to avoid permanent harm to states and banking institutions injured by this new form of balkanization, and to avoid serious disruption in the administrative functions of the Federal Reserve Board. *See Northeast* Petition at 9-15.

Finally, the Court should be aware of a recent development that has occurred since the *Northeast* Petition was filed. Although the Senate passed an omnibus financial services bill, S. 2851, Title X of which would have authorized regional banking compacts, the House declined to enact similar legislation. Thus, in 1984, as in 1983, Congress has once again refused to authorize exclusionary banking confederations.

In a September 14, 1984 letter to the Honorable Thomas P. O'Neill, Jr. discussing the proposed Title X of S. 2851, the Honorable Peter W. Rodino, Chairman of the House Judiciary Committee, made quite plain the lack of Congressional approval for such compacts, as well as the strong interest of the federal government in the regulation of interstate banking:

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11. This process of state-created balkanization proceeds apace. Since the *Northeast* Petition was filed, banking regulators, legislators, bankers, lobbyists and banking experts have met to discuss the formation of a banking compact in the Midwest similar to those already established in New England and the Southeast. An attempt to draft joint legislation in the Midwest is expected to be underway within weeks (A37).

"[That bill] contains language that would grant prior Congressional consent to certain groupings of States to enter into interstate compacts involving regional banking activities . . . . Title X on its face appears to be a major departure from past practices in the manner in which Congress approves an interstate compact consistent with the Compact Clause of the Constitution. In the past, Congress has consented to two types of compacts: the first being those which are designed to promote cooperation among States and which are open to all affected States seeking to join; and the second being those that do not interfere with the Federal regulation of matters of national concern. In contrast, Title X would appear to authorize a commercial compact open only to a 'select' group of States in subject matter areas specifically regulated by the Federal Government.

In addition, Title X departs from past Congressional practice and procedure in that it would grant prior approval to such compacts rather than to require subsequent approval on a case-by-case basis . . . . While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences.

By its very nature, an interstate compact of this type also raises other Constitutional questions requiring careful consideration. It is possible, even likely, that regional banking compacts designed to promote the interests of certain banks within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent States from aligning themselves into rival economic coalitions. If this were, in fact, the unfortunate outcome of Title X, such might invite retaliation by

States in excluded regions of the country." (A24-A26) (emphasis supplied).

Chairman Rodino's observations fully support petitioner's position that Congress has never authorized states to create the exclusionary regional banking compacts springing up across the country today, and certainly did not do so in the Douglas Amendment in 1956, at which time Congress never even envisioned the possibility that states would join together to form discriminatory banking zones.

* * *

Since the issues presented by this case are identical to those already before the Court in *Northeast*, petitioner respectfully suggests that the Court should act on this petition after it has decided whether to review the decision in *Northeast*, and should dispose of this case as appropriate in light of *Northeast*.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit in Citicorp v. Board of Governors, No. 84-4121 (October 10, 1984)

CITICORP, a Corporation,

Petitioner,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

On Petition for Review of an Order of the Board of Governors of the Federal Reserve System

Petitioner, Respondent and Intervenors hereby agree and stipulate as follows:

1. The petition for review in this case seeks review of an Order of the Board of Governors of the Federal Reserve System, dated August 20, 1984, approving Bank of Boston Corporation's acquisition of RIHT Financial Corporation ("the Board's August 20, 1984 Order").

2. The Board's August 20, 1984 Order shall be affirmed in this Court on the basis of this Court's decision in *Northeast Bancorp, Inc., et al.* v. *Board of Governors of the Federal Reserve System,* Nos. 84-4047, 4051, 4053, 4081 (August 1, 1984), petition for certiorari pending (Sup. Ct.

No. 84-363) (*"Northeast"*), without briefing and argument, and judgment will be entered in this Court accordingly. Petitioner is free to file a petition for a writ of certiorari with the Supreme Court to attempt to obtain reversal, vacation or modification of this Court's judgment in this case.

3. This Court's mandate in this case shall be stayed and the status quo maintained until the Supreme Court has disposed of *Northeast*.

4. The mandate in this case shall issue forthwith if (a) the petition for certiorari in *Northeast* is denied or (b) this Court's judgment in *Northeast* is affirmed. If the Supreme Court vacates, reverses or modifies this Court's judgment in *Northeast*, the mandate in this case shall not issue and the status quo shall be maintained until further order of this Court.

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Filed: October 10, 1984

So ORDERED:

/s/ L.W. PIERCE

LAWRENCE W. PIERCE

APPENDIX B

Order of the United States Court of Appeals for the Second Circuit in Citicorp v. Board of Governors, No. 84-4145 (November 5, 1984)

CITICORP, a Corporation,

Petitioner,

against

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

On Petition for Review of an Order of the Board of Governors of the Federal Reserve System

Petitioner, Respondent and Fleet Financial Group, Inc. hereby agree and stipulate as follows:

1. The petition for review in this case seeks review of an Order of the Board of Governors of the Federal Reserve System, dated October 4, 1984, approving the acquisition by Fleet Financial Group, Inc. ("Fleet") of Fleet National Bank of Boston and of Fleet National Bank of Connecticut ("the Board's October 4, 1984 Order").

2. By "So Ordering" this Stipulation, the Court grants Fleet's motion, dated October 17, 1984, to intervene in this matter.

3. The Board's October 4, 1984 Order shall be affirmed in this Court on the basis of this Court's decision in *Northeast Bancorp, Inc., et al.* v. *Board of Governors of the Federal Reserve System*, Nos. 84-4047, 4051, 4053, 4081 (August 1, 1984), petition for certiorari pending (Sup. Ct. No. 84-363) (*"Northeast"*), without briefing and argument, and judgment will be entered in this Court accordingly. Petitioner is free to file a petition for a writ of certiorari with the Supreme Court to attempt to obtain reversal, vacation or modification of this Court's judgment in this case.

4. The Board's October 4, 1984 Order and this Court's mandate in this case shall be stayed and the status quo maintained until the Supreme Court has disposed of *Northeast*, as provided in paragraph 5.

5. The stay described in paragraph 4 shall be vacated immediately, and the mandate in this case shall issue immediately, if (a) the petition for certiorari in *Northeast* is denied, or (b) this Court's judgment in *Northeast* is affirmed, or (c) the stay of the mandate of the Second Circuit in *Northeast* is vacated by the Supreme Court. If the Supreme Court vacates, reverses or modifies this Court's judgment in *Northeast*, the stay shall remain in effect, the

mandate in this case shall not issue, and the status quo shall be maintained, until further order of this Court.

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Filed: November 5, 1984

So Ordered:

/s/ L. W. Pierce

/s/ George C. Pratt

APPENDIX C

Order of the Board of Governors of the Federal Reserve System Approving the Application of Bank of Boston Corporation to Acquire RIHT Financial Corporation (August 20, 1984)

FEDERAL RESERVE SYSTEM

Bank of Boston Corporation
Boston, Massachusetts

Order Approving Acquisition of a Bank Holding Company and Companies Engaged in Insurance, Mortgage Banking, Trust, and Investment Advisory Activities

Bank of Boston Corporation, Boston, Massachusetts, a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("Act"), has applied for the Board's approval under section 3 of the Act (12 U.S.C. § 1842), to acquire the successor by merger to RIHT Financial Corporation, Providence, Rhode Island ("RIHT"), also a bank holding company.[1] As a result of this transaction, Applicant would acquire RIHT's subsidiary banks, Rhode Island Hospital Trust National Bank and Columbus National Bank of Rhode Island, both located in Providence, Rhode Island.

In addition, Applicant has applied for the Board's approval under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.23(a)(2) of the Board's Regulation Y (12 C.F.R. § 225.23(a)(2)) to acquire

1. Applicant has also applied under section 3(a)(1) of the Act (12 U.S.C. § 1842(a)(1)) for approval for its wholly owned inactive subsidiary, Rhode Island Holding Company ("RIHC"), to become a bank holding company by merging with RIHT. RIHC is of no significance except as a means to facilitate Applicant's acquisition of the voting shares of RIHT.

RIHT'S nonbanking subsidiaries: RIHT Life Insurance Company, Phoenix, Arizona ("RIHT Life Insurance"), which underwrites credit life and credit accident and health insurance directly related to extensions of credit by subsidiaries of RIHT; RIHT Mortgage Corporation, Charlotte, North Carolina ("RIHT Mortgage"), which engages in mortgage banking activities; The Washington Row Company, Providence, Rhode Island ("Washington Row"), an inactive company that formerly engaged in mortgage banking activities; Hospital Trust of Florida, N.A., Palm Beach, Florida ("HT Florida"), which engages in trust company activities; and HT Investors, Inc., Providence, Rhode Island ("HT Investors"), which provides investment advisory services. These activities have been determined by the Board to be closely related to banking and permissible for bank holding companies (12 C.F.R. §225.25-(b)(1), (3), (4), and (9)).

Notice of these applications, affording opportunity for interested persons to submit comments, has been given in accordance with sections 3 and 4 of the Act (49 *Federal Register* 11012 (1984)). The time for filing comments has expired, and the Board has considered the applications and all comments received in light of the factors set forth in section 3(c) of the Act (12 U.S.C. § 1842(c)) and the considerations set forth in section 4(c)(8) of the Act, including the comments of a shareholder of RIHT and of Citicorp, New York, New York, challenging the constitutionality of the Rhode Island statute under which the proposed acquisition is to be made.

Applicant is, and would remain upon consummation, the largest commercial banking organization in New England. Applicant, the largest commercial banking organization in Massachusetts with consolidated assets of $19.5 billion,

controls nine banking subsidiaries holding aggregate domestic deposits of $6.2 billion in the Commonwealth, representing 20.2 percent of the total deposits in commercial banks in Massachusetts.[2] On March 30, 1984, Applicant consummated its acquisition of Casco-Northern Corporation, Portland, Maine, thereby becoming the second largest commercial banking organization in Maine. It's one banking subsidiary in Maine has total domestic deposits of $631 million, representing 17.9 percent of the total deposits in commercial banks in Maine.[3] RIHT, the second largest commercial banking organization in Rhode Island with consolidated assets of $1.9 billion, controls two subsidiary banks holding aggregate domestic deposits of $1.6 billion, representing 25.9 percent of the total deposits in commercial banks in Rhode Island.

Applicant's subsidiary banks compete directly with RIHT's subsidiary banks in two banking markets: the Providence, Rhode Island, and Fall River, Massachusetts, banking markets. RIHT is the third largest of 17 commercial banking organizations in the Providence banking market[4] with $1.2 billion in deposits therein, representing

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2. Banking data are as of December 31, 1983, unless otherwise indicated.

3. In addition, on May 18, 1984, the Board approved Applicant's application to acquire Colonial Bancorp, Inc., Waterbury, Connecticut, which has consolidated assets of $1.4 billion and total domestic deposits of $1.2 billion. Upon consummation of that acquisition, Applicant would become the fourth largest banking organization in Connecticut. The Board has, however, stayed its approval of that application pending the completition of judicial review of the Board's Order.

4. The Providence banking market includes all of Rhode Island, except for the southwestern part of Washington County and the eastern part of Newport County, and in addition includes the City of Attleboro and the towns of Blackstone, Millville, North Attleboro, Norton, Plainville, Rehoboth, and Seekonk in Massachusetts. Market data for the Providence market is as of June 30, 1982.

15.9 percent of the total deposits in commercial banks in the market. Applicant is the 15th largest commercial banking organization in the market with $7.8 million in deposits, representing 0.1 percent of the total deposits in commercial banks in the market. Upon consummation of the proposed transaction, Applicant would become the third largest banking organization in the Providence banking market, with a market share of approximately 16 percent of the total deposits in commercial banks in the market.

The proposed acquisition would eliminate some existing competition in the Providence banking market. The market, however, is not highly concentrated, with the four largest banking organizations controlling 70.6 percent of the total deposits in commercial banks and a Herfindahl-Hirschman Index ("HHI") of 1738. Upon consummation of this proposal, the market's four-firm concentration ratio would increase to 70.7 percent and the HHI would increase only 3 points, to 1741.[5] In view of this small increase in market concentration and of the number and size of the remaining banking competitors in the market, consummation of this proposal would not have a significantly adverse effect on competition in the Providence banking market.

In the Fall River banking market,[6] Applicant is the largest of nine commercial banking organizations in the market with $96.3 million in deposits therein, representing 24.9 percent of the total deposits in commercial banks in

5. Under the Department of Justice Merger Guidelines, a market in which the post-merger HHI is between 1000 and 1800 is considered moderately concentrated. In such markets, the Department of Justice is unlikely to challenge a merger that produces an increase in the HHI of less than 100 points.

6. The Fall River banking market includes the southwestern part of Bristol County, Massachusetts, and the towns of Little Compton and Tiverton in Rhode Island. Market data are as of June 30, 1983.

the market. RIHT is the eighth largest commercial banking organization in the market with $5.7 million in deposits, representing 1.5 percent of the total deposits in commercial banks in the market. Upon consummation of this proposal, Applicant would remain the largest commercial banking organization in the Fall River banking market, with a market share of approximately 26.3 percent of the deposits in commercial banks in the market. The Fall River market is concentrated, with a four-firm concentration ratio of 81.8 percent and an HHI of 1917. Upon consummation of the proposal, the market's four-firm concentration ratio would increase to 83.3 percent and the HHI would increase 75 points to 1992.[7]

Although consummation of the proposed transaction would eliminate existing competition in the Fall River banking market, there are a number of factors that mitigate the anticompetitive effects of this proposal. Eight commercial banks would continue to operate in the market after consummation, including the largest banking organizations in Massachusetts and Rhode Island. The Board also has considered the influence of thrift institutions in evaluating the competitive effects of this proposal.[8] In the Fall River market thrift institutions control approximately 62 percent of the total deposits in the market, and the deposits of each of the three largest thrift institutions are substantially larger than those held by the largest commercial bank in the

7. Under the Department of Justice Merger Guidelines, where the post-merger HHI is 1800 or more, the Department will decide on a case-by-case basis whether to challenge a merger that produces an increase in the HHI of between 50 and 100 points.

8. The Board has previously determined that thrift institutions have become, or at least have the potential to become, major competitors of commercial banks. *NCNB Bancorporation,* 70 Federal Reserve Bulletin 225 (1984); *Sun Banks, Inc.,* 69 Federal Reserve Bulletin 934 (1983); *First Tennessee National Corporation,* 69 Federal Reserve Bulletin 298 (1983).

market. All six thrift institutions in the market offer a full range of consumer banking services. In addition, all six make commercial real estate loans, and five of the six engage in limited commercial lending activities. Based upon the size and activities of thrift institutions in the Fall River banking market, the Board concludes that thrift institutions exert a significant competitive influence that substantially mitigates the anticompetitive effects of the proposed transaction.[9]

After consideration of the above facts and other facts of record, the Board concludes that consummation of this proposal would not have a significant adverse effect on existing competition in any relevant market.

The Board has considered the effects of this proposal on probable future competition and also has examined the proposal in light of the Board's proposed guidelines for assessing the competitive effects of market-extension mergers or acquisitions.[10] In evaluating the effects of a proposal on probable future competition, the Board considers market concentration, the number of probable future entrants into the market, the size of the bank to be acquired, and the attractiveness of the market for entry on a *de novo* or foothold basis absent approval of the acquisition. After consideration of these factors in the context of the specific facts of this case, the Board concludes that consummation of this proposal would not have any significant adverse effects on probable future competition in any relevant market.

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9. If 50 percent of thrift deposits were included in the calculation of market concentration, the HHI would rise by only 22 points upon consummation of this proposal, from 1037 to 1059.

10. 47 *Federal Register* 9017 (March 3, 1982). Although the proposed Policy Statement has not been adopted by the Board, the Board is using the proposed guidelines in its analysis of the effects of a proposal on probable future competition.

There are nine banking markets in Massachusetts and fourteen in Maine in which Applicant, but not RIHT, competes.[11] With respect to the nine Massachusetts banking markets in which Applicant operates, in eight of these markets the record discloses more than six commercial banking organizations as probable future entrants into each of the markets. The ninth Massachusetts banking market, the Boston market, is not highly concentrated. With respect to the fourteen Maine banking markets in which only Applicant competes and the seven Connecticut banking markets into which Applicant's entry has been approved by the Board, the record discloses numerous commercial banking organizations as probable future entrants into each of these markets. On the basis of these considerations and other facts of record, the Board concludes that the elimination of RIHT as a probable future entrant into markets served by Applicant would not have a substantial anticompetitive effect in any of those markets.

There is one banking market in Rhode Island (Newport) and one in Connecticut (New London) in which RIHT, but not Applicant, competes. With respect to these two banking markets, the record shows that neither market is highly concentrated. On the basis of this consideration and other facts of record, the Board concludes that elimination of Applicant as a probable future entrant into markets served by RIHT would not have a substantial anticompetitive effect in any of those markets.

The financial and managerial resources and future prospects of Applicant and RIHT are consistent with approval

11. In addition, upon consummation of Applicant's acquisition of Colonial Bancorp, Inc., Applicant would compete in seven banking markets in Connecticut, in none of which RIHT competes.

of this application. Considerations relating to the convenience and needs of the communities to be served also are consistent with approval of the application.

Section 3(d) of the Act prohibits the Board from approving any application by a bank holding company to acquire any bank located outside of the state in which the operations of the bank holding company's banking subsidiaries are principally conducted, unless such acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." (12 U.S.C. § 1842(d)). Based upon its review of the Rhode Island interstate banking statute,[12] the Board concludes that Rhode Island has by statute expressly authorized, within the meaning of the Douglas Amendment, a Massachusetts bank holding company, such as Applicant, to acquire a Rhode Island bank or bank holding company, such as RIHT.[13]

This application raises a question under the United States Constitution concerning the constitutionality of a provision of the Rhode Island interstate banking statute that bars bank holding companies located outside of New England from acquiring banks in Rhode Island.[14] The Board has addressed the constitutionality of parallel Connecticut and Massachusetts statutes in its Orders approving

12. 1983 R.I. Pub. L. Ch. 201.

13. *See Bank of New England Corporation,* 70 Federal Reserve Bulletin 374, 375 (1984), and *Bank of Boston Corporation,* 70 Federal Reserve Bulletin 524 (1984). In these cases, an identical finding was made with respect to the parallel Connecticut interstate banking statute.

14. New England bank holding companies include those located in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

three previous interstate acquisitions under those statutes.[15] In its Bank of New England Corporation Order, after review of the record and in reliance on a detailed analysis of the constitutional issues included in an Appendix to the Order, the Board concluded that, while the issue was not free from doubt, there was no clear and unequivocal basis for a determination that the Connecticut statute is inconsistent with the Constitution.[16]

Subsequent to the Board's approval of the three prior applications under the Connecticut and Massachusetts interstate banking laws, protestants in each case sought judicial review of the Board's Orders on the sole ground that the Connecticut and Massachusetts interstate banking laws are unconstitutional. Following expedited review of the issues, the United States Court of Appeals for the Second Circuit issued an opinion in *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System,* Nos. 84-4047, 84-4051, 84-4053, and 84-4081 (2d Cir. Aug. 1, 1984), rejecting the petitioners' constitutional challenges to the New England statutes and affirming the Board's Orders. The constitutional issues involved in BBC's current application are the same as those resolved by the Second Circuit.[17]

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15. *Bank of New England Corporation, supra; Bank of Boston Corporation, supra; Hartford National Corporation,* 70 Federal Reserve Bulletin 353 (1984).

16. *Bank of New England Corporation, supra,* 70 Federal Reserve Bulletin at 376. It is the Board's policy that it will not hold a state law unconstitutional in the absence of clear and unequivocal evidence of the inconsistency of the state law with the United States Constitution. *See NCNB Corp.,* 68 Federal Reserve Bulletin 54, 56 (1982).

17. The only significant difference between the Rhode Island statute and the other two New England interstate statutes is that the Rhode Island statute terminates its provision restricting reciprocal interstate banking to other New England states on July 1, 1986, while the Massachusetts and Connecticut statutes have no such termination date. To the extent this fact alters the analysis of the Rhode Island statute, it adds an argument in favor of that statute's constitutionality not present in the analysis of the other two statutes.

In addition to seeking judicial review, the protestants to the Bank of New England Corporation and Hartford National Corporation applications obtained a stay of the Board's Orders from the Second Circuit pending that Court's consideration of those cases. In addition, following Citicorp's petition to the Board to stay its Order approving Bank of Boston Corporation's application to acquire Colonial Bancorporation, the Board issued a stay in reliance on the court-imposed stay in the previous cases.

Following the Second Circuit's decision in *Northeast Bancorp,* the Court on August 9 imposed a stay of its decision pending the Supreme Court's review of these cases. As a result of the Court's action, the prior interstate transactions approved by the Board may not be consummated until final action by the Supreme Court. The Board, therefore, has considered whether to stay the effectiveness of its action on this application pending such final judicial action. The protestants in this case have not requested a stay, and, under 5 U.S.C. § 705, the Board's authority to stay its action absent a petition for judicial review is not clear. Consequently, the Board has determined not to stay, on its own motion, the effectiveness of its decision in this case.

Applicant has also applied, under section 4(c)(8) of the Act, to acquire the nonbanking subsidiaries of RIHT: RIHT Mortgage, RIHT Life Insurance, HT Florida, HT Investors, and Washington Row.[18] RIHT Mortgage, which engages in mortgage banking activities, competes directly with mortgage banking subsidiaries of Applicant in the following markets: Boston, Massachusetts, Raleigh, North

18. Washington Row is currently inactive and will be liquidated by Applicant.

Carolina, and Atlanta, Georgia. RIHT Mortgage's market share of mortgage originations is not significant in any of these markets, and each market is unconcentrated in mortgage banking and has low barriers to entry in that product market. Thus, Applicant's acquisition of RIHT Mortgage would not eliminate any significant competition in any relevant market.

HT Florida provides personal trust services in Palm Beach County, Florida. Applicant engages in similar activities in Florida through its subsidiaries, Bank of Boston Trust Company of Southeast Florida, N.A., Deerfield Beach, Florida (which also competes in Palm Beach County), and Bank of Boston Trust Company of Southwest Florida, N.A., Sarasota, Florida. Together, Applicant's and RIHT's Florida trust subsidiaries manage total combined assets of $85 million. The combined market share of Applicant and RIHT in any relevant market is quite small, and the Florida market for trust services is highly competitive, with numerous competitors and low barriers to entry. Accordingly, consummation of this proposal would have little effect on competition for trust services in any relevant market.

After consideration of the above facts and other facts of record, the Board concludes that Applicant's acquisition of RIHT's nonbanking subsidiaries would not have a significant adverse effect on competition in any market. Furthermore, there is no evidence in the record to indicate that approval of this proposal would result in undue concentration of resources, unfair competition, conflicts of interest, unsound banking practices, or other adverse effects on the public interest. Accordingly, the Board has determined that the balance of the public interest factors

it must consider under section 4(c)(8) of the Act is favorable and consistent with approval of the application to acquire RIHT's nonbanking subsidiaries.

Based on the foregoing and other facts of record, the Board has determined that the applications under sections 3 and 4 of the Act should be and hereby are approved. The acquisition of RIHT's bank subsidiaries shall not be consummated before the thirtieth calendar day following the effective date of this Order or later than three months after the effective date of this Order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Boston, pursuant to delegated authority. The approval of Applicant's proposal to acquire RIHT's nonbanking activities is subject to all of the conditions contained in Regulation Y, including those in sections 225.4(d) and 225.23(b)(3) (12 C.F.R. §§ 225.4(d) and 225.23(b)(3)), and to the Board's authority to require such modification or termination of the activities of a holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and the Board's regulations and orders issued thereunder, or to prevent evasion thereof.

By order of the Board of Governors,[19] effective August 20, 1984.

(signed) James McAfee

James McAfee
Associate Secretary of the Board

[SEAL]

19. Voting for this action: Chairman Volcker and Governors Martin, Wallich, Partee, Rice, Gramley, and Seger. Governor Wallich abstained from the insurance portion of these applications.

APPENDIX D

Order of the Board of Governors of the Federal Reserve System Approving the Application of Fleet Financial Group, Inc. to Acquire Fleet National Bank of Boston and Fleet National Bank of Connecticut (October 4, 1984)

FEDERAL RESERVE SYSTEM

Fleet Financial Group, Inc.
Providence, Rhode Island

Fleet Financial Group, Inc., Providence, Rhode Island, a bank holding company within the meaning of the Bank Holding Company Act of 1956, as amended (12 U.S.C. § 1841 *et seq.*) ("Act"), has applied for the Board's approval under section 3(a)(3) of the Act (12 U.S.C. § 1842 (a)(3)) to acquire all of the voting shares of Fleet National Bank of Boston, Boston, Massachusetts ("Fleet Boston"), and Fleet National Bank of Connecticut, Hartford, Connecticut ("Fleet Connecticut"), both proposed new banks.

Notice of the applications, affording opportunity for interested persons to submit comments, has been given in accordance with section 3(b) of the Act. The time for filing comments has expired, and the Board has considered the application and all comments received in light of the factors set forth in section 3(c) of the Act (12 U.S.C. § 1842 (c)), including the comments of Citicorp, New York, New York, challenging the constitutionality of the Massachusetts and Connecticut statutes under which the proposed acquisitions are to be made.

Applicant, the largest banking organization in Rhode Island, has one banking subsidiary with total deposits of $3.3 billion, representing 39.7 percent of the total deposits in commercial banks in Rhode Island.[1] Both Fleet Boston,

1. Banking data are as of March 31, 1984.

which will compete in the Boston banking market,[2] and Fleet Connecticut, which will compete in the Hartford banking market,[3] are proposed new banks. Applicant currently competes in neither the Boston nor the Hartford banking market. In light of the *de novo* nature of these proposals, consummation of the proposed transactions would have no adverse effects on competition or the concentration of banking resources in any relevant area.

The financial and managerial resources and future prospects of Applicant, Fleet Boston, and Fleet Connecticut are consistent with approval of the applications. As *de novo* institutions, the two proposed banks will provide additional full service banking facilities, and thus considerations relating to convenience and need of the community to be served lend weight toward approval.

Section 3(d) of the Act prohibits the Board from approving any application by a bank holding company to acquire any bank located outside of the state in which the operations of the bank holding company's banking subsidiaries are principally conducted, unless such acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." (12 U.S.C. § 1842(d)). Based upon its review of the Massachusetts and Connecticut interstate banking statutes,[4] the Board concludes that Massachusetts and Connecticut have by statute expressly au-

2. The Boston banking market includes all of Suffolk and Essex Counties, most of Middlesex, Norfolk, and Plymouth Counties, and part of Worcester and Bristol Counties, Massachusetts. It also includes 13 towns in southern New Hampshire.

3. The Hartford banking market is defined as Hartford County, Connecticut.

4. Mass. Ann. Laws Ch. 167A, § 2; 1983 Conn. Acts 411, § 2.

thorized, within the meaning of section 3(d) of the Act, a Rhode Island bank holding company, such as Applicant, to acquire a bank or bank holding company in the authorizing state.[5]

These applications raise a question under the United States Constitution concerning the constitutionality of provisions of the Massachusetts and Connecticut interstate banking statutes that bar bank holding companies located outside of New England from acquiring banks in Massachusetts or Connecticut.[6] The Board has addressed the constitutionality of the Connecticut and Massachusetts statutes in its Orders concerning three previous interstate acquisitions under these statutes.[7] In its Bank of New England Corporation Order, the Board concluded that, while the issue was not free from doubt, there was no clear and unequivocal basis for a determination that the Connecticut statute is inconsistent with the Constitution.[8]

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5. *See Hartford National Corporation*, 70 Federal Reserve Bulletin 353, 354 (1984) (Massachusetts statute); *Bank of New England Corporation*, 70 Federal Reserve Bulletin 374, 375 (1984) (Connecticut statute); and *Bank of Boston Corporation* (Colonial Bancorp, Inc.), 70 Federal Reserve Bulletin 524, 525 (1984).

6. New England bank holding companies include those located in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

7. *Hartford National Corporation, supra; Bank of New England Corporation, supra;* and *Bank of Boston Corporation* (Colonial Bancorp, Inc.), *supra*.

8. *Bank of New England Corporation*, 70 Federal Reserve Bulletin at 376. It is the Board's policy that it will not hold a state law unconstitutional in the absence of clear and unequivocal evidence of the inconsistency of the state law with the United States Constitution. *See NCNB Corp.*, 68 Federal Reserve Bulletin 54, 56 (1982). The Board repeated these constitutional findings with respect to the Massachusetts statute in *Hartford National Corporation*, 70 Federal Reserve Bulletin at 354, and with respect to the closely parallel Rhode Island statute in *Bank of Boston Corporation* (RIHT Financial Corporation), 70 Federal Reserve Bulletin 737 (1984).

Subsequent to the Board's approval of the three prior applications under the Connecticut and Massachusetts interstate banking laws, protestants in each case sought judicial review of the Board's Orders on the sole ground that the Connecticut and Massachusetts interstate banking laws are unconstitutional. Following review of the issues, the United States Court of Appeals for the Second Circuit issued an opinion rejecting the petitioners' constitutional challenges to the New England statutes and affirming the Board's Orders.[9] The constitutional issues involved in Fleet's current applications are the same as those involved in the Second Circuit decision.

Based on the foregoing and other facts of record, the Board has determined that the applications should be and hereby are approved. The transactions shall not be consummated before the thirtieth day after the effective date of the Order, or later than three months after the effective date of this Order, and the banks to be acquired shall be opened for business not later than six months after the effective date of this Order, unless such latter periods are extended for good cause by the Board, or by the Federal Reserve Bank of Boston pursuant to delegated authority.

By order of the Board of Governors,[10] effective October 4, 1984.

(signed) James McAfee

James McAafee
Associate Secretary of the Board

[SEAL]

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9. *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, Nos. 84-4047, 84-4051, 84-4053, and 84-4081 (2d Cir. Aug. 1, 1984), *petition for cert. filed*, 52 U.S.L.W. 3189 (U.S. Sept. 6, 1984) (No. 84-363).

10. Voting for this action: Chairman Volcker and Governors Wallich, Partee, Rice, and Gramley. Abstaining from this action: Governor Martin. Absent and not voting: Governor Seger.

APPENDIX E

Order of the United States Court of Appeals for the Second Circuit Staying the Board's Order Approving the Bank of Boston Corporation Application (October 2, 1984)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-4121

CITICORP, a corporation,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

NOTICE OF MOTION

for *Stay of Respondent's Order and Expedited Hearing*

ORDER

Before: Hon. Wilfred Feinberg, Chief Judge, Hon. Ralph K. Winter, C.J., Hon Charles H. Tenney, D.J.

IT IS HEREBY ORDERED that the motion for a stay be and it hereby is granted. The appeal is expedited and shall be heard during the week of October 22, 1984. The oral application by RIHT Financial Corporation for a bond is denied.

ELAINE B. GOLDSMITH, Clerk

by: /s/ EDWARD J. GUARDARO

Edward J. Guardaro, Deputy Clerk

October 2, 1984

APPENDIX F

Letter from Peter W. Rodino, Jr., Chairman of the U.S. House of Representatives Committee on the Judiciary, to Thomas P. O'Neill, Jr., Speaker of the U.S. House of Representatives (September 14, 1984)

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, D.C. 20515
Telephone 202-225-3951

September 14, 1984

Honorable Thomas P. O'Neill, Jr.
The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

The "Financial Services Competitive Equity Act" (S. 2851), which was debated on the Senate floor during the past week, will reach the House shortly. On behalf of the Committee on the Judiciary, I am writing to you to request that this bill be referred to this Committee for consideration and possible action as a result of certain provisions which substantially affect matters coming within Rule X jurisdiction of the Committee.

In particular, Title X of S. 2851 contains language that would grant prior Congressional consent to certain groupings of States to enter into interstate compacts involving regional banking activities. It is important that this Committee—which has jurisdiction over interstate compacts generally—be permitted to review the language and intent of this provision because Title X on its face appears to be

a major departure from past practice in the manner in which Congress approves an interstate compact consistent with the Compact Clause of the Constitution. In the past, Congress has consented to two types of compacts: the first being those which are designed to promote cooperation among States and which are open to all affected States seeking to join; and the second being those that do not interfere with the Federal regulation of matters of national concern. In contrast, Title X would appear to authorize a commercial compact open only to a "select" group of States in subject matter areas specifically regulated by the Federal Government.

In addition, Title X departs from past Congressional practice and procedure in that it would grant prior approval to such compacts rather than to require subsequent approval on a case-by-case basis. Typically, compacts are negotiated and agreed to by the States and then submitted to the Congress for careful review and approval. Title X would, in essence, preauthorize compacts without advanced review of the content or standards contained in those agreements. While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences. The Judiciary Committee—the Committee of jurisdiction in this instance—has had no such opportunity to develop a record or engage in any deliberations on the potential Constitutional and economic implications of Title X.

By its very nature, an interstate compact of this type also raises other Constitutional questions requiring careful consideration. It is possible, even likely, that regional banking compacts designed to promote the interests of certain banks

within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent States from aligning themselves into rival economic coalitions. If this were, in fact, the unfortunate outcome of Title X, such might invite retaliation by States in excluded regions of the country.

Title X also has important implications for the Federal antitrust laws, also a subject matter within the jurisdiction of the Judiciary Committee. The cornerstone of American antitrust law is the principle that unrestrained competition will yield the best allocation of our economic resources, thus benefitting the interest of consumers. Because such compacts as provided by Title X may work to restrict competition for deposits and loans, the price for that type of restriction might well be paid by consumers. The implications of this legislation for the national competition policy will therefore also need careful scrutiny by this Committee.

For the above reasons, I request that you refer S. 2851 to the Judiciary Committee for its review. Furthermore, it is requested that Members of this Committee be included in any conference on S. 2851.

With best wishes,

Sincerely,

/s/ PETER W. RODINO
PETER W. RODINO, JR.
Chairman

PWR:jyl

APPENDIX G

American Banker (June 13, 1983)

COUNSELOR'S CORNER

NEW ENGLAND INTERSTATE LEGISLATION MAY SPUR US CONGRESSIONAL ACTION

By WILLIAM C. MUTTERPERL

On May 16, 1983, Rhode Island became the third New England state to adopt an interstate banking bill, following the lead of Maine and Massachusetts. Connecticut has also enacted an interstate banking legislation.

All of the interstate banking bills are similar in one key respect—they specifically permit out-of-state bank holding companies to acquire local banks and bank holding companies in order to comply with the provisions of the Douglas Amendment to the Bank Holding Company Act, which basically precludes a bank holding company based in one state from acquiring additional banks in another state, unless the statutes in that other state specifically permit acquisition of local banks by an out-of-state bank holding company.

The basis on which out-of-state financial institutions are permitted to acquire local banks, however, varies for every state which has enacted interstate banking legislation.

Delaware, South Dakota, and Maryland require varying minimum-size requirements. New York and Maine impose

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William C. Mutterperl is senior vice president and general counsel at Fleet National Bank, Providence, R.I.

reciprocity requirements. Massachusetts not only imposes a reciprocity requirement, but limits acquisitions to New England-based institutions. Alaska only allows acquisitions of existing banks, not newly established institutions.

These variations reflect the differing views of the state legislatures involved as to the potential benefits and pitfalls of interstate banking in their state.

Delaware, South Dakota, and Maryland, for example, are attempting to encourage the entry of large money center banks in the hope of creating jobs and tax revenues. This can be accomplished by enacting liberalized banking laws in tandem with interstate banking authority. The legislation is carefully structured to ensure that these institutions do not compete with local banks, but rather use the state as a base for out-of-state operations.

So far these efforts appear to have been successful, as is seen, for example, by the movement of credit card operations and other facilities of a number of major banks to these states. Those legislatures which have imposed reciprocity requirements appear less interested in entry by out-of-state banks than in permitting local institutions to expand elsewhere. These states grudgingly permit acquisitions on a reciprocal basis so that their financial institutions have the opportunity to acquire banks in other states which have imposed a similar reciprocity requirement.

The Massachusetts twist of imposing a regional limitation, in addition to a reciprocity requirement, seems designed to protect larger local banks from being acquired by money center financial institutions based in states such as New York, which have also adopted reciprocal interstate banking.

As with all interstate banking acts which have preceded it, Rhode Island's legislation is unique in certain respects.

Like the Massachusetts bill, it contains a reciprocity requirement and a New England regional limitation. But this latter restriction expires on July 1, 1986, at which time national reciprocal interstate banking is authorized. Prior to July 1, 1985, the act specifically precludes the possibility of hostile takeovers by requiring approval of a supermajority of shareholders or directors of a local target bank before it may be acquired.

Finally, no acquisitions are permitted until July 1, 1984. These peculiar provisions reflect the tug of war between the views of the various segments of Rhode Island's banking community as to the potential benefits and dangers of interstate banking to each. The legislature then reacted to the debate and attempted to assess the potential impact of interstate banking on Rhode Island's economy and consumers.

Owing to the concentrated nature of the Rhode Island banking market under applicable Justice Department and Federal Reserve Board guidelines, the opportunities for in-state expansion, such as recently occurred in the neighboring states of Massachusetts and Connecticut, are quite limited. Interstate acquisition, therefore, becomes the only viable option for substantial growth.

With an extremely varied financial services industry in the state, however, it is not surprising that a number of local banking institutions did not place such a high priority on the need for interstate expansion.

Several of the smaller banks did not feel that they would benefit by the increased ability to make acquisitions, and, in fact, feared the possibility of being taken over. Others, perhaps welcoming the opportunity to be purchased, desired the broadest possible group of potential acquirers.

A factor peculiar to Rhode Island is the ownership of a number of commercial banks by mutual savings banks and savings and loan associations. These entities had no concern about unfriendly takovers in view of their mutual form of ownership. Therefore, they generally favored the broadest form of an interstate banking bill.

The entire banking community did agree on one point: interstate banking was inevitable. But the question was whether to hasten the process, and if so, in what respect.

From the viewpoint of the proponents of interstate banking, the passage of the Massachusetts interstate banking act in late 1982 increased the pressure to obtain similar legislation in Rhode Island in 1983.

There was concern that other New England states, particularly Connecticut and New Hampshire, would promptly follow the Massachusetts lead, and that the most favorable acquisition candidates might be picked up very quickly.

As discussion of the issue moved forward, the positions of Rhode Island banks fell into basically three categories: those favoring a national reciprocal bill; those favoring a regional reciprocal bill; and those who wanted no part of the subject.

The proponents of the regional approach believed it to be a critical next step in the evolution of interstate banking. This would give institutions in the area time to affiliate and achieve larger size. They could better position themselves to avoid takeover by, and be more effective competitors of, the money center banks, when national interstate banking ultimately arrives.

The regional limitation was, therefore, envisioned from the beginning by its advocates as only a temporary restriction. This fact paved the way for a compromise with those

that preferred national interstate banking at the outset. This compromise limited the regional approach to a two-year period only.

Other Concessions Made

Other concessions had to be made to those institutions which felt threatened by interstate banking generally. One was to delay the effective date from approximately one year. This delay was not viewed negatively by the bill's proponents, since the expected time to be consumed in choosing a potential acquisition candidate, negotiating the deal, obtaining various state and federal regulatory approvals, and ultimately consummating the transaction might well exceed one year.

A further provision inserted directly in the bill designed to allay the fears of the banks concerned about hostile takeovers requires approval by a supermajority of the shareholders or the board of directors of the target banks of a proposed acquisition. This provision is set to expire on July 1, 1985, by which time all banks would have had ample time to adopt some form of "shark repellant" amendments in their charters.

Finally, an "antileap frog" provision was added to preclude a bank in a state outside the region, which has adopted reciprocal legislation (e.g. New York), from acquiring a bank within a New England state, which has also adopted a reciprocal act without the regional limitation (e.g. Maine), and from the latter state "leap frogging" into one of the states that has adopted the New England only approach, thereby short-circuiting the regional limitation.

Compromises Raise Legal Questions

There are several legal questions which are raised by several of these compromises, including the constitutionality of the regional limitation, and whether the legislation might be deemed to be more restrictive than, and therefore, nonreciprocal with reciprocal interstate banking legislation adopted in other states.

This article is not intended to provide an in-depth analysis of very complicated legal issues. But it may be interesting to summarize a few of the key points involved.

The constitutional questions seem to focus primarily on the validity of the regional approach under the compact, commerce, and equal protection clauses of the United States Constitution. The analysis of the issues, however, must not be done in a vacuum, but with reference to the Douglas Amendment itself, which at this time is the definitive congressional action in this area.

The compact clause precludes states from entering into agreements with each other without congressional approval. It is obviously helpful that the statutes in question are being independently passed by the various New England state legislatures, and are not, in fact, negotiated agreements between the states.

'Supremacy of the U.S.'

This does not necessarily preclude the possibility of a finding of a de facto agreement. The courts, however, have not interpreted the compact clause as broadly as its language suggests. Many interstate agreements have survived challenge.

The key appears to be whether the agreement in question "encroaches upon or interferes with the supremacy of the United States."

Although banking is clearly an area involving extensive federal regulation, the Douglas Amendment itself grants authority to the states to legislate and deal with interstate banking.

Similarly, with respect to the commerce clause, it is hard to see how state legislation which would allow limited interstate acquisitions could burden commerce, when Congress has basically prohibited all such acquisitions in the absence of specific state action. Regional interstate banking promotes, rather than restricts, interstate commerce beyond that which would otherwise exist.

Traditional equal protection analysis generally turns on whether the statute in question "bears a reasonable relationship to a legitimate state purpose."

The regional limitation should meet this standard in view of the state's legitimate desire to proceed cautiously on an experimental basis in a largely unchartered area.

Restricting interstate acquisitions during this experimental period to institutions which share a common background and are more likely to be committed to the New England region appears justifiable. It should be noted that Congress itself authorized a New England only experiment with respect to NOW accounts approximately 10 years ago.

Concentration of Resources

Should the Douglas Amendment be read to permit states to selectively allow acquisitions by out-of-state holding companies on some rational basis? The brief legislative history

indicates that a key purpose of the amendment was to avoid over concentration of banking resources in a few money center banks.

The regional limitation contained in the Massachusetts and Rhode Island legislation would appear to be consistent with this purpose.

The United States Court of Appeals for the District of Columbia Circuit approved a selective override in a case involving Iowa legislation which permitted additional acquisitions only be [*sic*] out-of-state bank holding companies which already owned Iowa banks.

In rejecting the claim of the Iowa Independent Bankers Association that a Douglas override is an all or nothing proposition, the court approved a statute which benefitted only one out-of-state bank holding company.

On the other side, some have suggested that the decision in Lewis versus B.T. Investment Managers Inc., in which a Florida statute banning all out-of-state bank holding companies from offering investment advisory services in Florida was struck down, bodes negatively for regional interstate banking. The case, however, is not really on point, since it involved limitations on entry relating to nonbanking activities, and, as such, is not a Douglas Amendment case at all.

A Legitimate Experiment

Another reason for feeling relatively sanguine on the constitutional issues in the case of Rhode Island is the expiration of the regional limitations on July 1, 1986. This should lessen any burden on interstate commerce and provide further support for the view that the regional approach is intended as a legitimate experiment or step in prepara-

tion for full scale interstate banking. It may also discourage any potential challenge.

It should be noted as of the writing of this article that Sen. Paul E. Tsongas and Rep. Barney Frank of Massachusetts have introduced legislation to ratify the actions of states adopting regional interstate banking bills.

While Congress may be unwilling to act to substantively authorize interstate banking at this time, it may be feasible for it to merely put its imprimatur on action taken by individual states for the limited purpose of resolving the legal issues. The fate of this legislation, however, is uncertain at this time.

Concerns About Reciprocity

Concerns about reciprocity arise by virtue of certain of the differences between the Rhode Island legislation and legislation in other states which also have imposed a reciprocity requirement.

Most of the acts grant to the state banking regulator the authority to determine whether provisions of sister state interstate banking legislation allow entry of local banks into the sister state upon terms no more restrictive than allowed by the local state.

It is anticipated that banking regulators will tend to be liberal in finding reciprocity in view of the purpose of encouraging interstate acquisitions—in fact, such a view is essential since no two interstate banking bills are identical. It is deemed unlikely, for example, that the temporary supermajority provision in the Rhode Island act, designed only to prevent hostile takeovers, would be found to destroy reciprocity.

New England as Testing Ground

It appears that New England could be the nation's first interstate banking zone. As such, it will become a national testing ground, much as it was for NOW accounts a few years earlier. In that case, of course, the experiment was specifically authorized by Congress. In the interstate banking case, it is the states which have taken the legislative initiative.

The U.S. Congress, which has been largely unwilling to act on interstate banking, can be expected to watch this experiment very closely.

If the New England regional experience is successful, it will encourage Congress to take definitive comprehensive action in this area.

The subject of interstate banking is one which cries out for consistent national treatment, as opposed to the widely varying piecemeal approaches adopted by the states.

When Congress does ultimately enact comprehensive interstate banking legislation, the states which took the initiative will be entitled to a large measure of the credit for making interstate banking a reality.

APPENDIX H

Chicago Tribune (October 23, 1984)

MIDWEST OFFICIALS WEIGH INTERSTATE BANKING COMPACT

By Bill Barnhart

Milwaukee—Officials in eight Midwestern states are trying to forge a banking compact that could allow interstate ownership of banks within the region.

Banking commissioners of Illinois, Indiana, Wisconsin, Iowa, Missouri, Minnesota, Michigan and Ohio have been meeting at the O'Hare Hilton Hotel, and an attempt to draft joint legislation will be underway by Thanksgiving, according to William P. Dixon, Wisconsin banking commissioner.

Dixon was one of 20 state banking regulators, legislators, bankers, lobbyists and banking experts who addressed a daylong conference on Midwest regional banking Friday in Milwaukee's Marc Plaza Hotel.

The conference drew 250 persons from the eight states.

In Theory, a Midwest regional banking compact, similar to those established in New England and the Southeast, would permit bank holding companies in the region to acquire or establish banks within the region.

The idea is considered an interim step toward full nationwide interstate banking. Federal laws presently prohibit banks and bank holding companies from owning deposit-taxing commercial banks outside their home states unless a target state permits such a move.

The concept of a Midwest banking compact is highly controversial, however. For example, Thomas H. Huston,

Iowa banking commissioner, told the conference he has no interest in joining such a compact and opposes interstate banking generally.

Neal F. Zimmer, president pro tem of the Ohio State Senate, said his state is interested only in interstate banking among states that border Ohio.

On the other side, George R. Slater, chairman and chief executive officer of the Marine Corp., a Milwaukee bank holding company, said an eight-state Midwest compact would provide "the opportunity for existing Midwest (bank) holding companies to combine into perhaps 10 to 20 powerful Midwest holding companies big enough to survive and compete in the financial jungle of the 1990s.

"It Encourages regional banking institutions headquartered in the Midwest, which have as their primary focus the economic health of this region," Slater said.

In addition to the eight-state compact, Slater said, Wisconsin and Illinois should enact legislation that assures the free movement of capital and banking services between the six counties in northeastern Illinois and the six counties in southeastern Wisconsin. Marine already has a minority interest in Elm Bancshares, holding company for the Bank of Elmhurst.

"Wisconsin public policymakers should attempt to strengthen the existing economic ties between Milwaukee and Chicago," Slater said. "Any bank holding company in this entire 12-county area must have free and equal access to acquire and merge with banks and bank holding companies throughout this 12-county megalopolis."

Ill. State Sen. Jeremiah Joyce (D., Chicago), chairman of the Illinois Senate Finance Committee, told the conference: "I couldn't care less one way or another" whether a regional banking compact is formed.

But He Cautioned that such a compact might have an unwelcome member—a major New York bank.

"I am convinced that after the election, Continental (Illinois National Bank and Trust Co. of Chicago) will be acquired by an out-of-state entity," probably a New York bank, he said.

The Illinois Bankers Association is studying the Midwest bank compact idea. The rival Independent Community Banks in Illinois, which represents mostly smaller banks, is opposed to interstate banking.

Many of the speakers at Friday's conference stressed that they believe interstate banking is inevitable and that if the Midwest doesn't take steps to strengthen its indigenous banks, the region will be overwhelmed by banks from New York and California.

"We in the Midwest have a limited time to prepare ourselves for the changes that will come our way," said Tom Loftus, speaker of the Wisconsin Assembly and conference host. He said banking is moving from a highly protected to a highly predatory industry.

Several Speakers also noted that C. Todd Conover, comptroller of the currency, plans to begin considering more than 300 applications from banks to form so-called non-bank banks throughout the nation.

These organizations escape federal bank structure laws because they either don't accept demand deposits or don't make commercial loans and therefore technically aren't banks. Such institutions presumably could be established anywhere in competition with banks.

Republican Gov. Terry Branstead of Iowa has written President Reagan protesting Conover's decision, according to Huston.

Proponents of the regional compact at the conference argued that it would help create jobs and foster economic development, would stimulate competition and thereby benefit bank customers and prevent Congress from dictating the fate of banking in the Midwest.

Opponents said interstate banking, regional or nationwide, merely would permit big banks to get bigger, to the detriment of small businesses and consumers.

"SMALL BUSINESS will be subject to banking by formula," said Harvey S. Lederman, who recently retired as director of the former Heller Institute for Small Business in Chicago.

Lederman said the interest in interstate banking "bucks the trend" toward decentralization and against bigness.

"Allowing the troubled banks of Chicago or the monster holding companies of Minneapolis to penetrate Wisconsin, Ohio, Indiana or Iowa doesn't automatically bring a public benefit in its wake," said Kenneth A. Guenther, executive director of the Independent Bankers Association of America.

Eugene W. Kuthy, commissioner of financial institutions in Michigan, said he doesn't expect a Midwest regional banking compact to evolve as it has in New England and the Southeast.

For one thing, the eight Midwestern states are much larger geographically and have less in common, he said.

"We are likely to go each our own unique ways, with less capability and willingness to use each other as a model," he said.